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phone conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 DAVID LEIBOWITZ, et al.,

4 Plaintiffs,

5 v.

19 Civ. 9236 (KPF)

20 Civ. 169 (KPF)

20 Civ. 211 (KPF)

20 Civ. 453 (KPF)

6 iFINEX INC., et al.,

7 Defendants.

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New York, N.Y.

February 27, 2020

4:10 p.m.

10 Before:

11 HON. KATHERINE POLK FAILLA,

12 District Judge

13 APPEARANCES

14 ROCHE CYRULNIK FREEDMAN LLP

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1 (Case called)

2 THE COURT: Thank you very much, and let me thank all  
3 of you participating in this call and I recognize that there  
4 are many of you.

5 My deputy has given me the equivalent of a sign-in  
6 sheet with all of your names, so as not to double the length of  
7 this conference, I won't ask folks to announce their presence  
8 on the call and that means, very subtly, that if you want to  
9 hit mute, that's fine too, so that you can have your reactions  
10 and not interrupt the rest of the call.

11 Let me please read to you my decision and let me  
12 preface it by saying that I find these particular motions to be  
13 interesting on many levels. Number one, they require you to do  
14 a lot of self-promotion but each of you, who has participated  
15 in this process, actually has much to promote. And, I also  
16 think it is very strange, it is like I'm -- I don't know --  
17 giving the last rose on "The Bachelor" or something like that  
18 where I feel as though everyone is qualified and everyone is  
19 good but I have to pick among you. In so doing, I am looking  
20 at Federal Rule of Civil Procedure 23(g) and I am looking at  
21 the work that counsel has done, the experience of counsel, the  
22 knowledge of the applicable law, and the resources that have or  
23 will be committed. And on these issues it seems to me that  
24 each of the three suggested teams of attorneys would suffice.  
25 The work that counsel has done is analogous and I do recognize

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1 the differences among what the firms have done, but they are --  
2 it is all analogous -- counsel's experience on these issues,  
3 especially on the class action side of things, is beyond  
4 serious dispute. The knowledge of the applicable law I think  
5 is equally obvious to the degree that it can be possible to  
6 understand some of the law in this case as it is new and  
7 emerging, and everyone has committed an appropriate amount of  
8 resources to participation in this case.

9 So, what I am left with in this setting is trying to  
10 figure out who best represents or can represent the interests  
11 of the plaintiff class or putative class in this case. In  
12 order to do that, after the very, very good oral argument we  
13 had the other day, I wanted to look at things again and so I  
14 went back and read your motions and related submissions. I  
15 looked at your websites. And, I looked at the cases, not all  
16 of them, but a sampling of the cases that you cited to me as  
17 your exemplars in order that I could see the work that you have  
18 done. And so, I appreciated the opportunity to have a couple  
19 of extra days to do that.

20 What interests me about this case is that it is an  
21 interesting combination of old and new. The cryptocurrency law  
22 is quite novel and lots of issues and not a lot of resolution,  
23 but there is a lot of established law out there as well with  
24 respect to pleading requirements, with respect to traditional  
25 antitrust issues and RICO and the Commodities Exchange Act.

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1           So, beginning with the work that I did to winnow down  
2 counsel to the one I will ultimately select, the first thing I  
3 considered and an area -- one of the few areas, I think, in  
4 which the sides meaningfully differed, was on the issue of the  
5 class definition. And on some level the Robbins Geller firm  
6 staked their application on the inappropriateness of the other  
7 two teams' class definitions. I thought it was very  
8 interesting and very thought provoking but it was somewhat  
9 undercut when counsel at the oral argument then indicated that  
10 he was likely to amend in order to add a class of futures  
11 purchasers. So, at that the point of the force of his argument  
12 was undercut and it became a lot more like the class offered by  
13 the Kirby team of attorneys. But more fundamentally, I can't  
14 agree with a class as narrow as that initially defined by the  
15 Robbins Geller firm and my concern here is they're cutting off  
16 the line too soon into the matter. It may be, as was argued by  
17 the other attorneys involved, that ultimately evidence will not  
18 bear out the breadth of the class definition that is offered by  
19 the Leibowitz complaint, for example, but I do think it is  
20 appropriate that they have the opportunity to at least try to  
21 plead it.

22           I also, just on a related point, I disagree that my  
23 consideration of the Roche firm, that they're actually somehow  
24 violative of 23(g). I am not able and I am not going to  
25 disaggregate them and say that one team could do one thing and

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1 that's all that can be considered. I looked at what they have  
2 done and what they've done as of the time of the motion and I  
3 don't think this is a situation where there is some sort of  
4 *post hoc* propping up. So, I just wanted to note that that was  
5 an argument with which I disagreed.

6 So, I am sorry to say that the Robbins Geller firm is  
7 not the firm that I am selecting, although I do appreciate  
8 their efforts, and that leaves us, as between the Kirby and the  
9 Roche entrants in this matter. I believe that there is  
10 comparable work that has been done. I might ascribe less  
11 significance than they might to certain of the arguments that  
12 were made, for example, who filed first, or the significance or  
13 not of a proprietary algorithm, or who has or who can identify  
14 certain trade dates, or the degree to which materials were  
15 really publicly available, or the product of some very  
16 thoughtful lawyering or potential expert witness analysis. And  
17 so, on that level, I found a lot of similarity but, as I said a  
18 few moments ago, the issue is that there are very interesting  
19 new novel issues and some more established issues that might  
20 just have a few tweaks to them.

21 I see that you have offered to me teams that can  
22 handle any of these issues, and so what I did at the end was to  
23 look at the work product in other cases so that I could  
24 ascertain or determine who I felt could best represent the  
25 class, and part of that best representation is who I felt could

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1 best illuminate the issues, new and old, that I believed are  
2 going to be implicated by this litigation. And ultimately I  
3 have concluded that that is the team in the Leibowitz matter,  
4 the Roche team, Roche and others and I am not going to list all  
5 of the attorneys. So, I am granting their motion for  
6 appointment as interim lead plaintiff counsel and I am thanking  
7 very much the others who have submitted motions in that regard.  
8 I am not trying to be pat in saying it was a very difficult  
9 decision. It is why I needed the additional time and the  
10 additional research but I am comfortable now with the decision  
11 I have made.

12 I will again reiterate, because I feel obliged to,  
13 that given the number of firms involved I just want to state at  
14 the outset that there ought to be no inefficiencies, no  
15 duplication, no padding of hours, and I am sure that the group  
16 of attorneys I have selected will find a way to efficiently  
17 divide labors without any need for duplication.

18 I also want to note, and this is something I was  
19 hinting at previously, that I would like a single point person,  
20 I suppose two if need be, but I want someone appropriately  
21 seasoned and senior. I don't want someone's junior associate  
22 being the person who stands up in court, although, if need be,  
23 maybe we will have some arguments set for them. But, in terms  
24 of when information is being presented to me, it best come from  
25 someone who knows what they are doing.

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1           And, with that, I have resolved the motions. I do not  
2 know, because I don't know if the defense has had an  
3 opportunity to discuss with all three teams, whether and when  
4 there would be a consolidated class action complaint and so let  
5 me ask a representative of the Roche team, or a representative  
6 of the defendants, Mr. Walden perhaps -- Mr. Walden, I will  
7 just ask you: Has there been discussion about a time frame for  
8 an amended consolidated class action a complaint?

9           MR. WALDEN: No, your Honor, but we plan to do that  
10 promptly.

11          THE COURT: Okay. That's great.

12          So let me imagine, Mr. Walden, that you will speak  
13 with the folks with whom you need to speak and I will get  
14 something in the next week with a schedule.

15          Does that make sense to you, sir?

16          MR. WALDEN: Yes, Judge.

17          THE COURT: Terrific. Then that's what we are going  
18 to do.

19          I will ask someone on this call -- I imagine more than  
20 one firm will -- obtain a transcript of this decision.

21          Oh, someone's gotten off the call, I suppose they're  
22 disappointed with the ultimate decision.

23          With that in mind, that's all I needed to address.  
24 From the Leibowitz team, Mr. Roche, is there anything else you  
25 need to bring to my attention?



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1 MR. ROCHE: No. We will follow up with the Court once  
2 we have coordinated with Mr. Walden on the timeline for the  
3 consolidated amended complaint.

4 THE COURT: I thank you very much.

5 Ms. Lerner, is there anything else from your clients  
6 that you wish to bring to my attention?

7 MS. LERNER: No, your Honor. Thank you.

8 THE COURT: Thank you very much.

9 Mr. Linkh, is there anything else you would like to  
10 bring to my attention?

11 MR. LINKH: No, your Honor. There is not.

12 THE COURT: Thank you.

13 Mr. Cochran, anything else to bring to my attention?

14 MR. COCHRAN: No, your Honor. Thank you.

15 THE COURT: Thank you so much.

16 And Mr. Walden, I should have asked you, anything else  
17 to discuss with me today?

18 MR. WALDEN: No. Thank you, Judge.

19 THE COURT: Thank you very much. We are adjourned.  
20 Thank you.

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